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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Petitioners,

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its more than 360,000 members come from every state and territory and the District of Columbia. The ABA's constituency includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges on the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in related fields.

The ABA has a long-standing interest in immigration policy issues and in the fair enforcement and implementation of our nation's immigration laws. Consistent with these principles, and to help implement them, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law in 1983, comprised of representatives of nine ABA entities with specialized expertise (*e.g.*, administrative law). The ABA has a particular interest in the right of persons in immigration proceedings to have access to counsel. In 1983, the ABA House of Delegates approved a Resolution which expressed the ABA's opposition to "legislative proposals relating to immigration and naturalization that would limit the rights of persons subject to exclusion, deportation or asylum proceedings to retain counsel and to enjoy full representation."

Because of the overwhelming need for counsel to assist aliens facing deportation, the Coordinating Committee has assisted in organizing numerous *pro bono* immigration representation efforts and trained volunteer attorneys from the private bar to counsel aliens and represent them in deportation and other proceedings before the Immigration and Naturalization Service ("INS" or "Immigration Service"). Most recently, in November 1990, the ABA undertook an intensive Immigration *Pro Bono* Development project to further develop *pro bono* and low cost legal services for persons in immigration proceedings. This project has led delegations to INS detention centers in Texas and Florida to assess representation needs and develop solutions.

The ABA has an active and direct interest in the efficient and equitable administration of justice. The ABA appears as *amicus curiae* in this case because the question presented has serious implications for the access of immigration law applicants to legal representation.

The ABA has received the consents of all parties to this case to present its views.

SUMMARY OF ARGUMENT

1. The challenged regulation will force virtually every detained person without financial means but with a valid claim to immigrate or for relief from deportation to face adversarial administrative proceedings without the benefit of legal representation. The "no work" bond condition affects all detained individuals whether they ultimately would prevail in a well-presented claim or not. It directly affects those who lack the financial resources to support themselves and to retain counsel, even though they might ultimately prevail in the deportation case. Thus, the bond condition creates a "Catch 22": detainees must accept the bond condition and be at temporary liberty without counsel or financial means to support themselves, or they must remain in jail to be fed and clothed, largely guided by fellow detainees as advisors, until their immigration hearing is finally determined—often months, and sometimes even years later. Essentially the "no work" bond condition assumes that the detainee has no right to enter or to remain in this country. Yet this is precisely the determination which is to be made by the Immigration Judge in the deportation proceeding, and it is the issue which the alien needs the assistance of counsel to present. Neither option—release without employment or continued detention—presents any meaningful opportunity to obtain counsel. Each puts the respondent at a significant risk of prejudice in meeting the burden of proof and prevailing in deportation proceedings.

2. Indeed, assistance of counsel is a virtual necessity if aliens are to receive a full, fair and complete adjudication of their claims. The complexity of deportation proceedings, the intricacies of substantive immigration law, the clear burden of proof and risk of evidentiary insufficiency placed on the applicant in immigration hearings and the relative lack of legal sophistication of applicants combine to make access to counsel vitally important in these cases. Congress itself recognized the need for access

to legal representation in this context, and provided for it, without equivocation, in the Immigration and Nationality Act (hereinafter, "INA" or "the Act").

ARGUMENT

I. IF IMPLEMENTED, THE CHALLENGED REGULATION WILL RESULT IN MANY DETAINED PERSONS WITH VALID CLAIMS TO BE PRESENT AND REMAIN IN THE UNITED STATES BEING FORCED TO FACE IMMIGRATION PROCEEDINGS WITHOUT THE ASSISTANCE OF COUNSEL.

Individuals who are detained by the INS and issued an order to show cause why they should not be deported find themselves in a system that is fraught with obstacles to obtaining legal representation. *See infra* at pp. 9-11. The bond condition challenged in this case will add a new hurdle to the already difficult barriers to securing counsel which face a person in deportation proceedings.[1] Although the Immigration Service attempts to characterize the challenged regulation as merely prohibiting unauthorized employment, the issue is far more complicated. The true test of this regulation is whether it impairs the ability of persons with valid claims to be present in the United States to have those claims adjudicated with the assistance of counsel of their choice. The "no work" bond condition fails this test, frustrating the rights even of people the Immigration Service would concede have valid claims.

A. The Challenged Regulation Will Affect All Persons Detained By The INS Who Do Not Have Sufficient Resources To Sustain Themselves And Pay For Legal Representation Without Engaging In Employment.

The argument that the "no work" bond condition will affect only those people who have entered the country il-

[1] These existing barriers are pervasive and have been well documented by courts and commentators. *See infra* at pp. 9-11.

legally and are deportable, but who seek discretionary relief, Pet. Br. at 25, ignores the plain language of the challenged regulation.[2] The bond condition prohibits from working the large number of persons in deportation proceedings whose legal right to be and remain in the United States is the central issue to be decided.[3]

[2] At a minimum, the regulation will prohibit from working all persons detained by the INS who did not have authorization to work prior to the time they were detained. In fact, the regulation is more sweeping in its effect. The only persons who would escape the "no work" prohibition are those whom *the INS concedes* already have authorization to work incident to their status. Thus, a person who has been granted work authorization pursuant to one of the "discretionary" grounds, *e.g.*, having filed a non-frivolous application for political asylum, will be subject to the bond condition. This is because such "discretionary" grants of work authorization automatically terminate when a person is placed in detention. Although it is technically accurate to say that the termination provision does not prohibit any such person from applying for work authorization, Pet. Br. at 24 n.15, the INS accepts work authorization applications only from persons who are not in detention. 8 C.F.R. § 274a.12 (c)(13). Thus, detainees first must accept the "no work" bond condition before they can even apply for authorization to work.

Furthermore, it seems unlikely that the Service, on the heels of terminating an individual's authorization to work, would then proceed immediately to re-issue the authorization. Indeed, the very language in which the Government phrases its argument indicates that such persons likely will not be granted authorization to work. *See* Pet. Br. at 13 ("aliens in deportation proceedings who lack work authorization should not be permitted to seek employment while released on bond") and 23 ("Where an alien . . . is unable to establish . . . that he or she is authorized by law to work . . . there is good reason not to allow that person to take a job").

[3] This consideration is not insignificant. Persons arrested by the INS and placed into deportation proceedings often are entitled to be present and remain in the United States. *See, e.g., Local 512, Warehouse & Office Workers Union v. NLRB*, 795 F.2d 705, 721 (9th Cir. 1986); *C.M.K. v. Richardson, Attorney General*, 371 F. Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States"). Although the Immigration Service has now stated, without regulatory enactment or APA compliance, that the bond condition "normally" will not apply, for ex-

There can be no doubt that the challenged regulation will prohibit from working individuals who are legally entitled to work.[4] The argument that cases in which persons the INS decides to put into deportation proceedings will have colorable claims to remain in the United States which they would need the assistance of counsel to present will be "rare," only serves to highlight the predicament facing those who do have valid claims. The INS puts in deportation proceedings those whom its officers apprehend and decide will not be able to sustain their burden of proof of eligibility. Thus, the concepts are

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ample, to individuals maintaining a "colorable claim" to U.S. citizenship, Pet. Br. at 25 n.16, and that, in any event, such persons could apply for discretionary work authorization upon a showing that "there is a reasonable chance that legal status may ensue in the future," 8 C.F.R. § 274a.12(c)(13)(iii), relying on INS's view of what is a "colorable" claim is certainly cold comfort. For a person without ready documentation, and without counsel to help marshal and present the facts, demonstrating that a claim is "colorable" or likely to prevail is as difficult as proving the claim in the first place. If a colorable claim were so easy to establish, deportation presumably no longer would loom as a threat.

Moreover, the "solution" that all a person in this predicament needs to do is to apply for work authorization has little basis in reality. First, as the Ninth Circuit has construed the challenged regulation, the bond condition would prohibit all work—authorized or not—upon release from detention until the immigration hearing. Thus, application for discretionary work authorization would be to no avail. But even if one accepts the contention, not embodied in any statute or regulation, that the bond condition will not be enforced as a matter of practice or custom to prohibit authorized work, the INS's argument should be greeted with skepticism, for it has repeatedly failed to issue work authorization documents in conformance with its own regulations. In many instances, work authorization is not timely granted, or not granted at all until the applicant brings a mandamus action against the INS. *See, e.g., Ramos v. Thornburgh*, 732 F. Supp. 696 (E.D. Tex. 1989) (granting partial preliminary injunction against INS on claim that it wrongfully denied and failed to timely grant or deny work authorization).

[4] Indeed, the Government admits as much in its brief. Pet. Br. at 25 n.16.

used, in circular fashion, to deprive the alien of liberty and the best opportunity to make a case in proceedings. It comes as no surprise that the INS argues now that its officers' initial decisions about deportability are usually right. In many cases they become a self-fulfilling prophecy.

B. The Challenged Regulation Subjects Detainees To A "Catch 22."

Most respondents in deportation proceedings do not have adequate financial resources to obtain counsel, absent the opportunity to work. In part due to the highly technical nature of substantive immigration law, *see infra* at pp. 15-17, and in part due to the substantial numbers of people put into deportation proceedings each year,[5] the level of available free legal representation for such people is grossly inadequate.[6] The ABA has devoted sig-

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[5] Latest available public statistics show that in 1989, 118,906 deportation cases—of which 20,331 (about 17%) involved applicants for political asylum—were filed by the INS with the Executive Office for Immigration Review. Executive Office for Immigration Review, *Statistical Summary* (November 13, 1989).

[6] For example, in a study of the conditions of detention of undocumented aliens, a group of concerned organizations reported on their attempts to secure *pro bono* representation for persons detained at the INS's Oakdale, Louisiana, facility, the largest detention center operated by the INS:

> Efforts to recruit and train lawyers in New Orleans to assist at Oakdale were finding only a few willing and able to volunteer to provide the needed *pro bono* representation. Indeed, in response to a request sent to more than 600 lawyers in the area in 1984, only three indicated a willingness, with qualifications, to represent detainees on a *pro bono* basis.

American Civil Liberties Union, Church World Service, Lutheran Immigration & Refugee Service, National Council of La Raza, San Francisco Lawyers' Committee for Urban Affairs, *Detention of Undocumented Aliens* Part 1, 86 (October 1990) (hereinafter, "*Detention Study*"). At the time, the Oakdale facility housed over 700 detainees. Existing organizations which attempt to fill the desperate need for free legal assistance are taxed beyond their resources. *See*

nificant resources toward the development of a *pro bono* immigration bar, but these efforts do not meet the existing and the growing need.[7]

The harsh reality is that most individuals seeking to exercise their right to obtain counsel undoubtedly will have to pay for it. Thus, almost invariably, a person's only hope of obtaining counsel during the period of time between release from detention and the deportation hearing is to earn enough to meet those payments.

Persons arrested by the INS who are unable to pay for an attorney to help them present their claim are left to decipher the puzzle that is immigration law on their own. This task has proven arduous even for skilled and experienced immigration attorneys, as American immigration law is notoriously complex. To make matters worse, individuals in deportation proceedings typically are educationally disadvantaged. Many cannot speak English; some cannot even read or write in their native language. *See infra* at pp. 17-18.

Moreover, the bond condition has the greatest impact on those who have valid claims to relief. Such persons risk much to pursue the chance to have their claims

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ABA Coordinating Committee on Immigration Law, *Lives on the Line: Seeking Asylum in South Texas*, 15 (July 1989) (hereinafter, "*ABA South Texas Report*").

[7] The paucity of free legal resources for persons in deportation proceedings is exacerbated by the fact that local legal services programs may use Legal Services Corporation funding to assist only certain designated categories of non-citizens. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 101-515, § 607, 104 Stat. 2101, 2148-53 (1990). Thus, the main resource to which indigent litigants turn for legal assistance is foreclosed to most persons in deportation proceedings. Furthermore, Equal Access to Justice Act ("EAJA") funds traditionally have not been available for deportation representation, although the issue is currently before this Court. *Ardestani v. United States Dep't of Justice, INS*, 904 F.2d 1505 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991).

adjudicated before an immigration judge. Although hundreds of thousands of people are apprehended by the INS each year, 90% leave the country willingly shortly thereafter when offered voluntary departure. Those who decline to depart the country must endure the hardships of detention or raise significant sums of money for bail, all for the opportunity to present their claims in immigration court. These claims—to U.S. citizenship, registry, suspension of deportation, political asylum, adjustment of status—are frequently complex and require detailed documentation and offers of proof. Thus, it is these people who most need the assistance of counsel. And yet it is these same people who will suffer most from the challenged bond regulation.

The statutory right to obtain counsel, *see infra* at pp. 14-15, which should operate to protect persons apprehended by the INS who have strong claims, is meaningless if they do not have a reasonable opportunity to exercise that right. *See Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (INS must give "more than lip service to the right to counsel"). Here, the no-work bond condition effectively will prevent nearly all persons facing deportation from exercising their right to counsel. Thus, individuals in detention are faced with an essentially meaningless choice as regards the right of access to legal representation: they must either stay in jail, or they must raise bail and accept a bond condition which prohibits employment and which, if violated, will result in forfeiture and re-incarceration.

As difficult as it is for an alien without funds to secure representation after being released from INS custody, persons against whom the "no work" bond condition is enforced face even greater obstacles to securing counsel and preparing their immigration defenses if they are returned to INS custody. Once in detention, an individual's access to legal counsel is completely regulated by the INS, and this access is "severely restricted." Helsinki Watch, *De-*

tained, Denied, Deported: Asylum Seekers in the United States 48 (June 1989). As documented in the *Orantes-Hernandez* case, 919 F.2d 548 (9th Cir. 1990), conditions of detention have included total or partial bans on writing materials, restrictions on telephone use, daily announcements of the availability of voluntary departure (without notifying detainees of other rights), limiting daytime visiting hours with attorneys, distributing inaccurate legal services lists, and placing detainees in solitary confinment without a hearing under the guise of administrative segregation. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).[8]

Moreover, the problem of securing representation is aggravated by the INS's practice of transferring large numbers of detained aliens to remote detention facilities where there is little, if any, free legal assistance available. *See* Note, *INS Transfer Policy: Interference With Detained Aliens' Due Process Right To Retain Counsel*, 100 Harv. L. Rev. 2001, 2005 (1987). The INS may place an individual in any detention center it likes, no matter how far away from family, friends, or available counsel. Many INS detention centers are in areas far from any concentration of legal services, free or otherwise, such as in Harlingen, Texas. *See* Lawyers Committee for Human Rights and Helsinki Watch, *Mother of Exiles* 69-70 (1986).[9] Although the INS is required to

[8] The court in *Orantes-Hernandez* upheld a permanent injunction which required the INS to notify detainees of their right to apply for political asylum and of their right to be represented by counsel. In upholding the injunction, the court found that the unacceptable conditions of detention which had been documented in proceedings below, and which impaired detainees' access to counsel, had not abated despite the lower court's entrance of a preliminary injunction imposing similar requirements.

[9] The INS operates seven detention centers which are capable of detaining 2,429 persons, contracts with private facilities for detention of another 950 persons, and has arrangements with over 900 state and local prisons and jails for additional space. Hearings

provide a list of free legal counsel to all detainees, 8 C.F.R. § 242.1(c), these lists are often inaccurate or out of date.[10]

Even when detainees have been able to overcome these initial barriers and actually secure representation, "[l]awyers have had trouble getting access to their clients." *Detention Study* at 87. *See also ABA South Texas Report* at 13 (legal representatives experience delays of several hours waiting for their clients to be escorted to the interview area, even when counsel provided the names of clients they wished to see in advance). The INS sets attorney visitation hours, controls telephone access to attorneys, and structures all visits by attorneys to the detention center.

Simply put, INS power over the conditions surrounding access by detainees to counsel is absolute,[11] and well-documented abuses of that power abound. Because it in-

on INS Management Issues: Hearings Before the Subcom. on Int'l Law, Immigration, and Refugees of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 9 (1991) (testimony of Arthur Helton).

[10] *See, e.g., Detention Study* at 86 ("lists of available legal services were often inaccurate or out of date"); *ABA South Texas Report* at 13; Amnesty International USA, *Reasonable Fear: Human Rights and United States Refugee Policy*, 15 (March 1990); Minnesota Lawyers International Human Rights Committee and Physicians For Human Rights, *Hidden From View: Human Rights Conditions in the Krome Detention Center*, 6 (April 1991) ("INS officials fail to adequately inform detainees about opportunities for pro bono legal representation and refuse to allow others to so notify detainees"); *Orantes-Hernandez*, 919 F.2d at 564-65 (upholding district court in finding that many legal services lists provided to detained aliens "did not contain accurate telephone numbers and . . . many of the offices were not located in the vicinity where the alien was being detained").

[11] *See* Gilboy, *Setting Bail in Deportation Cases: the Role of the Immigration Judges*, 24 San Diego L. Rev. 347, 398 (1987) ("the authority of immigration officials to set bail is an anomaly in law enforcement").

evitably results in the detention of indigent aliens, the "no work" bond condition will deny access to counsel to vast numbers of people who are legally present in this country and are simply awaiting a judicial declaration of that status but who are being treated from the outset as ineligible.

In light of the vital private interest of persons facing deportation and the clear, well-documented risk that, absent representation by counsel, a person entitled by law to remain in this country may be erroneously deprived of that right, courts have given careful scrutiny when reviewing INS regulations or practices that may impede acecss to counsel. As with all deportation procedures, "[m]eticulous care must be exercised lest the [deportation] procedure . . . not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

When INS procedures have unreasonably obstructed a person's right to retain counsel, such procedures have been struck down. For example, in *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985), the court found that the immigration judge had violated an alien's right to retain counsel by not *sua sponte* granting further continuances until counsel could be retained. Indeed, when called upon to review the INS's deportation procedures, courts of appeals have often found it necessary to enjoin the INS from imposing or applying procedural rules that block a person's access to legal counsel. *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1040 (5th Cir. 1982) (declaratory and injunctive relief granted where Haitians in Florida were not given a hearing on their asylum claims at a meaningful time and in a meaningful manner; the normal scheme for asylum processing contemplates full opportunity for the alien to present his case); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (Salvadoran respondents entitled to permanent injunction requiring INS to give them oral notice

of the right to counsel prior to any request to sign a voluntary departure form).[12]

II. ASSISTANCE OF COUNSEL IN IMMIGRATION PROCEEDINGS IS ABSOLUTELY VITAL TO INSURE A FULL AND FAIR ADJUDICATION OF A RESPONDENT'S CLAIM.

This Court already is familiar with the plight of persons who the INS has placed in deportation proceedings. They typically are undereducated, unfamiliar with the language in which they are being accused, and without the financial resources to obtain counsel to assist them in presenting their claims.[13] *See infra* at pp. 17-18. The

[12] Likewise, courts of appeal have been reluctant to find that a person has waived the right to retain counsel. *See, e.g., Montilla v. INS*, 926 F.2d 162, 170 (2d Cir. 1991); *Van Den Berg v. Lehmann*, 261 F.2d 828, 829 (6th Cir. 1958) (respondent in deportation proceeding did not understand, speak or read English, had never been represented by counsel of his own choice, and had no intelligent, reasonable opportunity to explain circumstances); *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (waiver of right to counsel "without being provided with any understanding by the immigration judge of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf" found invalid); *Rios-Berrios v. INS*, 776 F.2d at 863 ("The record demonstrates that the immigration judge proceeded instantly to take evidence, an action that would intimidate an alien appearing before him, particularly after the chilling warning that the hearing would proceed and that no further continuances would be granted. We will not hear the INS argue waiver on the facts of this record").

[13] *See, e.g.*, Gordon, *Right to Counsel in Immigration Proceedings*, 45 Minn. L. Rev. 875, 877 (1961) ("The persons involved in immigration proceedings usually are aliens, and generally they are in the less privileged economic class. Often they are at the threshold of our country, or have recently arrived, and they have little or no comprehension of our language or institutions."); Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 Harv. L. Rev. 2001, 2008 (1987) ("most aliens are unfamiliar with both the English language and the American judicial system and a lawyer is essential in presenting their claims").

substantive and procedural aspects of the laws under which such persons may be claiming relief from deportation or exclusion undoubtedly are some of the most intricate and complicated provisions of American law. Representing the Government on the other side of this adversarial proceeding is an INS trial attorney trained in the complexities of immigration law.

In recognition of the fundamental imbalance inherent in such a proceeding, and the substantial interest a respondent has in its outcome, Congress explicitly granted the right to counsel, at no expense to the Government, to all respondents in deportation or exclusion proceedings.[14] Titled "Right to Counsel," Section 292 of the Act mandates that

> [i]n any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362. Moreover, section 242 of the Act—the same section which authorizes the Attorney General to set conditions of bond for aliens released from detention—directs the Attorney General to adopt regulations governing deportation proceedings which "shall include" the requirement that "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1252(b)(2). *See also Rios-Berrios v. INS*, 776 F.2d at 862. The legislative history of these provisions confirms that Congress intended to confer a *right*.[15]

Persons facing deportation or exclusion proceedings without the assistance of counsel may be utterly helpless to present their claims. Respondents in these proceedings are usually completely unfamiliar with the American legal system, and substantive immigration law is not simple. At least one commentator has ranked the INA "second only to the Internal Revenue Code in complexity." Hull, *Without Justice For All* 107 (1985). Likewise, the Fifth Circuit, after a lengthy opinion in which it attempted to unravel the intricacies of certain INS regulations, admonished the Service:

> In its brief the INS states "the public, of course, has a right to obtain guidance from the regulations for

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[14] Since deportation and exclusion proceedings are considered to be civil rather than criminal in nature, the Sixth Amendment affords no right to appointed counsel in such proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984). But "where the courts declined to see a constitutional remedy, Congress saw a dictate of humanity." *Castro-O'Ryan v. U.S. Dept. of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988). We do not address the constitutional argument here, because there is an adequate statutory basis for decision. We note, however, that courts have found that respondents in deportation proceedings *do* have a due process right to *access* to counsel. *See Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) ("the Due Process clause . . . affords an alien the right to counsel of his own choice at his own expense"); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) ("This court has held that aliens have a due process right to obtain counsel of their choice at their own expense"); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection").

[15] *See* H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 57, *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1712 ("Regulations promulgated by the Attorney General for the conduct of hearings *must* provide . . . that the alien *shall* have the *right* of being represented (at no expense to the Government) by counsel") (emphasis added). There is nothing in the legislative history to indicate that, by granting the Attorney General discretion to set bond conditions, Congress meant to vitiate—or to permit the Attorney General in any way to diminish—the right of persons in deportation or exclusion proceedings to obtain counsel. Yet the challenged regulation clearly frustrates the benefits intended to be conferred by the same statute.

> its dealings with the Service." We devoutly hope the INS and those who draft the regulations and Operations Instructions under which it operates will take this statement to heart. Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon. There is nothing esoteric about the subject matter. The regulations concern simple matters of great concern to human beings, most of them of limited education. They should be so written as to be comprehensible by intelligent laymen and unspecialized lawyers without the aid of both lexicon and inner-circle guide.

Dong Sik Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).[16]

Unfortunately, the Service has not yet heeded the Fifth Circuit's plea to make the regulations simpler and more intelligible. There can be no doubt that the substantive immigration law that may be applicable in deportation proceedings—the various types of lawful statutes, the requirements for citizenship and derivative citizenship, and the myriad grounds for expulsion—is extremely complicated. For example, the Act sets forth five general classes of offenses, including nineteen subcategories, which may result in deportation, and these general classes translate into hundreds of separate specific grounds when the language of the Act is fully parsed. 8 U.S.C. § 1251(a). The interpretation of these provisions has often proved difficult even for experts in immigration law. *See, e.g., Dong Sik Kwon*, 646 F.2d at 919.

[16] Critics of the almost perverse complexity of the Act and its associated regulations abound. As Chief Judge Kaufman of the Second Circuit noted, "[w]e have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). *See also* Address by J. Wasserman, 3 *Immigration and Naturalization Law Institute*, 309 (1970) ("Our Statute is the longest, the worst, the most ambiguous, the most complicated and illogical statute in the world").

Negotiation of this labyrinthian morass by an indigent person without the assistance of counsel is often impossible. This Court has recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Deportation and exclusion proceedings, especially those which involve the complicated inquiry necessary to determine an individual's legal status, are certainly such cases.

The procedural aspects of these proceedings can be equally daunting, further underscoring the need for meaningful access to representation. The burden of proof and insufficiency of evidence is on the alien in deportation proceedings. Individuals entitled to relief may be denied if they fail to present their evidence in a way that meets their burden of proof. In many ways, deportation and exclusion proceedings are as complex as any adversarial hearing, involving the opportunity to subpoena witnesses and documents, to take depositions, to conduct informal discovery, to elicit testimony by expert witnesses, and to conduct cross-examination of adverse witnesses. *See* 8 C.F.R. §§ 242.16(a), 292.5(b), 287.4, 236.2(d), 242.14(e). Clearly, without the assistance of counsel it is unlikely that persons arrested by the INS will be able to avail themselves of many of the procedural tools that might be useful in presenting their cases. In contrast, to effectively use these procedures, the government is represented by an INS trial attorney, a specialist trained in immigration law.

To compound the imbalance between the INS attorneys and unrepresented aliens, respondents in deportation proceedings are usually impoverished and are frequently un-

educated, unfamiliar with the American legal system and the English language, and often come from countries where the legal system is repressive and does not encourage people to insist on their claims. As this Court has noted, one finds in deportation proceedings "a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950). It would be difficult to imagine a group of people more ill-equipped to confront the complexities of immigration law and procedure than the majority of individuals in deportation and exclusion proceedings.

And yet, the risk of loss—of liberty, property, friends, and especially family—facing those in deportation proceedings is enormous. "Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties." *Lok v. INS*, 548 F.2d at 39.[17] As Justice Brandeis so eloquently put it, deportation "may . . . result in loss of both property and life; or all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Given the complexity of substantive immigration law and the enormity of procedural possibilities in deportation

[17] This Court has held that deportation proceedings are not criminal in nature, and thus are not subject to the constraints of the Sixth Amendment. *INS v. Lopez-Mendoza*, 468 U.S. at 1038-39. But it hardly can be contended that deportation is a typical civil proceeding either. To the contrary, as this Court has itself recognized, the consequences facing a potential deportee may be especially harsh. *See, e.g., Bridges v. Wixon*, 326 U.S. at 154 ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted"); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("[the individual's] interest [in deportation proceedings] is, without question, a weighty one").

proceedings, it is not surprising that persons who are represented by counsel in this process are more likely to prevail against the Government's effort to deport them. *See, e.g.*, Gordon, *Right to Counsel in Immigration Proceedings*, 45 Minn. L. Rev. 875 n.23 (1961); Black, *Due Process and Deportation—Is There A Right To Assigned Counsel?*, 8 U. Cal. Davis L. Rev. 289, 301-302 (1975). Sixty years ago a national commission on law enforcement reported the obvious: in "many cases" a lawyer acting for an alien would prevent a deportation "which would have been an injustice but which the alien herself would have been powerless to stop." Wickersham National Commission on Law Observance and Enforcement, "Report on the Enforcement of the Deportation Laws in the United States," in 5 *Report on the Cost of Crime* 109 (1931). Clearly, "[s]ince 1931 the law on deportation has not become simpler." *Castro-O'Ryan*, 847 F.2d at 1312. In light of these factors, courts have consistently emphasized the critical role of counsel in deportation proceedings, characterizing an alien's right to counsel of his choice as "fundamental."[18] Assistance of counsel is critical since "[t]he fate of an alien faced with imminent deportation often hinges upon narrow issues of statutory interpretation." *Lok v. INS*, 548 F.2d at 38.

Indeed, a General Accounting Office report shows that persons in deportation proceedings who request political asylum are more than three times as likely to prevail against the Government when they are represented by counsel as compared to unrepresented respondents. Government Accounting Office, *Asylum: Approval Rates for Selected Applicants*, Appendix Table 1.1 (GAO June 1987). In its report on detention conditions of asylum

[18] *Baires v. INS*, 856 F.2d 89, 91 n.2 (9th Cir. 1988). *See also Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *United States v. Saucedo-Velasquez*, 843 F.2d 832, 834-35 n.2 (5th Cir. 1988); *Cobourne v. INS*, 779 F.2d 1564, 1566 (11th Cir. 1986); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975).

seekers in south Texas, the ABA Coordinating Committee concluded that "the participation of counsel is a highly determinative factor in ensuring that bona fide applicants receive the full and fair asylum adjudications to which they are entitled." *ABA South Texas Report* at 3. Without access to legal counsel, persons arrested by the INS who have valid claims to be present and remain in the United States run a significant risk of being deported because they have failed to adequately present their claims.

CONCLUSION

For the foregoing reasons, *amicus* American Bar Association urges that the decision of the Court of Appeals for the Ninth Circuit be upheld.

Respectfully submitted,

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